SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RALPH L. FUSCO,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioner, Max Louis Peskoe, respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on November 14, 1946 (134).

Statement of the Matter Involved

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

The petitioner was convicted upon a charge of having violated the Selective Training and Service Act of 1940, as

amended.[1] The indictment was returned February 6, 1945 (1a). The petitioner was convicted at a trial held in June, 1945, but the verdict was set aside and a new trial granted 2. It is on the conviction at the subsequent trial and the affirmance thereof, by the Circuit Court of Appeals (134) that this petition is based.

The facts as they relate to the charge appear to be uncontroverted. They are as follows:

On May 12, 1941, the petitioner received a questionnaire; in reply thereto, petitioner sent the following letter:

(Ex G-1A Offered 24) (119)

"May 14, 1941.

Local Board No. 2,
Middlesex County,
Raritan Township,
Municipal Bldg., Lindeneau,
R. D. 19, New Brunswick, N. J.

GENTLEMEN:

I wish to advise that at the present time I hold a commission of Second Lieutenant in the inactive reserve of the U. S. Army, having secured this commission after the completion of four years of R.O.T.C. at Rutgers University in 1929.

I believe this information will eliminate the necessity for filling out the enclosed form.

I will be glad to furnish any further information that you may desire.

Sincerely yours,

(S.) MAX PESKOE."

MP:JD.
Enc.

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[1] 50 U. S. C. A. App. Sec. 301, etc.

In response to his letter, petitioner received the following letter from his Draft Board.

(Ex G-1AA Offered 24) (111)

"May 16, 1941.

Mr. Max Peskoe,
60 Cedar Avenue,
Highland Park, New Jersey.

DEAR SIR:

We are in receipt of your letter of the 14th relative to not filling out your questionnaire.

This Board would like to have something to substantiate your statement that you are a Second Lieutenant in the inactive reserve of the U. S. Army.

Your immediate cooperation will be appreciated.

Very truly yours,

(S.) GENE M. CRANE,
Chief Clerk."

On May 17, 1941, there was entered by the Draft Board on petitioner's questionnaire (G-1b offered 42) (112H) a classification I-C. In response to the letter of the 16th, the petitioner presented his commission granted in 1934, which by its terms was good for five years (Notice of termination of the commission was mailed to petitioner by the War Department, July 27, 1939), to Mrs. Oram, a clerk in the office of the Draft Board (42), as a result of which, on May 21, 1941 a notation was made by her on the letter of May 16, 1941, written by the Draft Board as follows:

"May 21, 1941
4 yrs. R.O.T.C. training
Rutgers
Red'd Commission 1929"

This information was presented to the Draft Board right after it was obtained (45). The next transaction was a

letter from the Draft Board to the petitioner, set forth below.

(Ex G-1C Offered 30) (113)

"February 6, 1942.

"DEAR SIR:

We would thank you to advise us of your present status since the declaration of war.

Your immediate cooperation in this matter will be greatly appreciated.

Very truly yours,

JOHN J. McCABE,
Chairman."

At the bottom of which letter is the following statement by the petitioner:

"February 10, 1942.

DEAR SIR:

My status has not been changed.

Sincerely,

MAX PESKOE."

In October, 1942, petitioner notified the Draft Board of his change of address (61).

The petitioner was reclassified I-A on July 11, 1944, after receipt by Draft Board of a letter, in answer to its query, that the petitioner's commission had expired in 1939 (34), and later reclassified II-A on November 4, 1944 (Ex. G-1B 112H offered 10, 24).

Section 311 of the Act, upon which this indictment is based, describes seven substantive offenses,[2] under which clauses 2 and 3 appear to have any relevancy:

> "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act,

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[2] 50 U. S. C. A. App. Sec. 311. See *Singer* v. *United States*, 323 U. S. 338, 341 (1945).

> or the rules or regulations made or directions given thereunder, (1) . . . (2) who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and (3) any person who shall knowingly make, or be a party to the making of, any false statement, or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, . . . shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished. . . ."

The indictment alleges a violation of the Act, in that the letter of February 10, 1942 was written to induce the Draft Board to give and allow the petitioner a classification to which he was not entitled, having previously informed the said Board by letter dated May 14, 1941, as to eligibility and liability for military service in the manner of the letter of that date, set forth above.

At the time of his classification in May, 1941, the petitioner was married and had been for ten years (57) and would have been placed in the deferred classification III-A (60); he had been in the Officers Reserve Corps, more than six years, entitling him to be placed in classification IV-A (82-3); petitioner did not meet physical standards required by the Armed Forces (63-4); he was a necessary man in an essential occupation entitling him to be placed in the deferred classification II-A, which petitioner subsequently received in November, 1944 (34).

This Court Has Jurisdiction

This case involves "an important question of Federal law, which has not been, but should be, settled by this Court." (Supreme Court rule 38 par 5 (b).) This Court has never decided the contention first passed upon by the

Circuit Court of Appeals for the Third Circuit, relating to an interpretation of clause 3, Section 311 of the Selective Training and Service Act of 1940.[3] The clause referred to relates to the prosecution of one who knowingly makes any false statement as to his liability or nonliability for service.

Application of the determination of the question by the Circuit Court of Appeals for the Third Circuit would result in such a departure from the accepted and usual course of judicial proceedings, as to prompt a review thereof by this Court. It would allow a jury in the United States District Court to determine:

That inactive reserve means, Officers Reserve Corps;

That status means, liability or nonliability for service;

That the failure of the Draft Board to properly apply the Executive Order[4], would be grounds for convicting the petitioner;

That criminal intent was present, even though at all times the petitioner could have obtained deferment on other grounds;

That the letter of May 14, 1941, action on which was barred by the Statute of Limitations,[5] could be incorporated without reference in a subsequent letter of February 10, 1942, to sustain prosecution.

The result of such construction would subject a registrant under the Selective Service Act to a criminal prosecution and conviction if the Draft Board should improperly classify him through its own error. In this case the peti-

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[3] 50 U. S. C. A. App. Sec. 311.

[4] Executive Order 8560, October 4, 1940 • • • Volume 3, Classification and Selection • • • Section 21, paragraph 344; Selective Service Regulations (2d ed.) 622.15; C. C. H. Manpower Law Service 13.022.

[5] Statute of Limitations. 18 U. S. C. A. Supp. Sec. 582; "No person shall be prosecuted, tried, or punished for any offense, not capital, • • • unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed."

tioner said "inactive reserve"; the Draft Board erroneously concluded "Officers Reserve Corps", when it placed him in I-C.

Despite the "Two Court Ruling", this Court, to make sure that the public's natural feeling of abhorence in time of war, for persons accused of violation of the Selective Service Act, shall not produce substantial miscarriage of justice has reviewed such cases on the facts. *Bartchay* v. *U. S.*, 319 U. S. 484, 489.[6]

The Questions Presented

1. Whether petitioner was guilty of making a false statement as to his liability or nonliability to serve, under clause 3, Section 311, Selective Training and Service Act of 1940.

2. Whether letter of February 10, 1942, "My status has not been changed" constitutes a violation under said Act.

3. Whether the indictment charged any offense against the United States.

4. Whether prosecution for any alleged violation was barred by the Statute of Limitations.

Reasons Relied On for the Allowance of the Writ

1a. The indictment fails to charge an offense against the United States.

b. Clause 2 of Section 311 makes it a violation to knowingly make, or be a party to the making of any false or improper classification. There is no averment in the in-

[6] *Bartchay* v. *United States*, 319 U. S. 484, 87 L. ed. 1534 "Because the conviction involved an interpretation of an important regulation under the Selective Service Act," and in reviewing the evidence, decided that the evidence was insufficient to sustain the conviction, of knowingly failing to keep Draft Board informed of his address. • • •"

dictment that the petitioner made any improper classification or that an improper classification of him was made. This contention was sustained in the opinion of the Circuit Court of Appeals (129).

c. Clause 3 of Section 311 makes it a violation to knowingly make a false statement as to one's liability or nonliability for service. The letter of February 10, 1942 says nothing about the petitioner's liability or nonliability for service. It says "my status has not been changed".

2. There is no designation of inactive reserve or 4 years R.O.T.C. in the Executive Order[7] setting up classifications. The error of classification, if any was made, was that of the Draft Board, in improperly applying the regulations setting forth the categories under I-C.

3a. The Draft Board did not rely on the letter of the petitioner but requested him to produce evidence to substantiate his letter of May 14, 1941. It was produced in the form of a commission dated 1934 and good for five (5) years, and if any error occurred, it was by reason of the action of the representative of the Draft Board.

b. The only classification I-C made by the Board, is that shown on the petitioner's questionnaire dated May 17, 1941. There is no evidence that the Board relied on the letter of February, 1942 to continue that classification.

c. The latest information which the Board had available on which to base its classification was dated May 21, 1941. 4 years R.O.T.C. (112A) etc. If there was any reference in the letter of February 10, 1942 it would be to the last evidence submitted.

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[7] Executive Order 8560, October 4, 1940 • • • Volume 3, Classification and Selection • • • Section 21, paragraph 344; Selective Service Regulations (2d ed.) 622.15; C. C. H. Manpower Law Service 13.022.

4a. Petitioner would have been deferred at all times, by reason of his being married and his being a necessary man in an essential occupation, his having been a Reserve Officer for at least six (6) years (82-3), and by further reason of the fact that he did not meet the physical standards required by the Armed Forces (63-4).

b. When the errors in classifications were discovered and upon submission of additional proof in 1944, petitioner was classified II-a.

5. The letter of Draft Board, February 6, 1942, asks "present status since declaration of war" (December 7, 1941). There is no reference by Board to any former letters by petitioner. His reply would refer only to any change since December 7, 1941. These facts do not constitute an offense under the Act.

6. Any action based on the letter of May 14, 1941 was barred by the Statute of Limitations since the indictment was not returned until February 6, 1945 (1). Where an offense is a completed offense at the time of its commission, it cannot be revived by a subsequent letter which does not in any manner refer to it.

Respectfully submitted,

RALPH L. FUSCO,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered on a Per Curiam opinion on July 23, 1946. Petition for rehearing was entertained and was on November 14, 1946 denied. The opinion has not yet been reported but is printed in full in the record (127-134).

Jurisdiction

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has, in this case, decided an important question of Federal law which has not been, but should be,

settled by this Court. The Circuit Court of Appeals has, in this case, also decided a question of Federal law in a way probably in conflict with applicable decisions of this Court (*Pendergast* v. *U. S.*, 317 U. S. p. 412, 87 L. Ed. p. 368; *U. S.* v. *Irvine*, 98 U. S. 450, 25 L. Ed. 193). The decision of the Circuit Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to require (in the interest of justice) an exercise of this Court's power of supervision. (Supreme Court Rule 38 Par. 5 (b). *Bartchay* v. *U. S.*, 318 U. S. 484, 87 L. Ed. 1534. *Baumgartner* v. *U. S.*, 322 U. S. 665 at 670).

Judgment was entered in this case by the United States Circuit Court of Appeals on November 14, 1946.

Statement of the Case

There are no controverted issues of material facts. The questions involved relate:

To whether statements of the petitioner, I hold a commission in the inactive reserve; and a subsequent statement, my status has not been changed, were made with criminal intent and in violation of Section 311 of the Selective Service Act which makes it an offense to knowingly make a false statement as to one's liability or nonliability for service; and whether the running of the Statute of Limitations, commencing on May 14, 1941 was interrupted by the letter of February 10, 1942.

Errors Relied Upon

The Court below erred as follows:

1. In failing to reverse the judgment of the District Court, for its error in overruling petitioner's contention that the indictment does not charge an offense.

2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for a directed verdict on the grounds of insufficient evidence.

3. In concluding that "The statement that the defendant held a commission of Second Lieutenant, in the 'inactive reserves of the United States Army,' after having completed four years in the Reserve Officers Training Corps might quite properly support a finding by a jury that the defendant had stated to his local Board that he held a commission of Second Lieutenant in the Officers Reserve Corps."

4. In concluding that "The jury was entitled to find and apparently did find, that when the defendant sent his February, 1942, letter, he reasserted the false statement originally made by him in the May 1941 letter."

5. In failing to reverse the judgment of the District Court for its error in overruling petitioner's motion to set aside the judgment on the ground that there was a lack of criminal intent.

6. In failing to reverse the judgment of the District Court for its error in overruling the defendant's motion to quash on the ground that prosecution was barred by the Statute of Limitations.

Points of Law

Point I

The indictment fails to charge an offense against the United States.

Point II

There is no designation of inactive reserve or 4 years R. O. T. C. in the executive order setting up classification. The error of classification was that of the Draft Board in improperly applying the regulations setting forth the categories under I-C.

Point III

There was no reliance by the Draft Board on the letter of May 14, 1941.

POINT IV

There is no evidence of any intent to commit a crime since the petitioner would have been deferred for other reasons during all of this period.

POINT V

The letter of February 10, 1942 refers, and is in answer to the letter of the Draft Board, dated February 6, 1942, wherein its asks "Present Status Since Declaration of War" (December 7, 1941).

POINT VI

Action on the letter of May 14, 1941 was barred by the Statute of Limitations since the indictment was not returned until February 6 (1).

ARGUMENT

For the purpose of clarity, the points enumerated under the argument follow the same order as the reason urged in the petition. Briefly put, it is the contention of the petitioner, that there was never any statement made as to liability or nonliability for service under the Act. Nowhere in Section 305 of the Act, is one exempted or relieved from military service by his holding a commission in the "inactive reserve of the United States Army," nor does the Executive Order designating the categories under the classification I-C set forth "inactive reserve." If there was any error, it was that of the Draft Board in improperly applying the Act, and the Executive Order based thereon.

There is clearly no evidence of any criminal intent, since the petitioner, and it is conceded, as held by the Circuit Court of Appeals in its opinion "He might at that time have requested a deferment upon several grounds. He was living with his wife to whom he had been married in 1931 and who depended upon him for her entire support. His eyesight

was below the standards established by the Army for acceptance of men into the service. He was engaged in an essential occupation, so treated by his own board since at least one of his employees who was registered with the same board had been and was continuously deferred for the duration of the war by reason of his occupation" (77). In addition he might have been placed in category IV-A for he served at least six years in the Officers Reserve Corps (82-3).

If for the purpose of this argument, we concede that his letter of May 14, 1941 constitutes an offense, an action thereon was barred by the Statute of Limitations and the later letter of February 10, 1942 cannot be used to toll the Statute.

Point I

The indictment fails to charge an offense against the United States.

The contention of the petitioner that no offense is charged under clause 2 of Section 311 [8] was sustained by the Circuit Court of Appeals in its opinion (129).

The indictment fails also, to charge an offense under clause 3 of Section 311.[9] To charge an offense under this clause, it is necessary to allege that the defendant knowingly made a false statement as to his liability or nonliability for service. The indictment does not allege that the 1942 letter referred to petitioner's liability or nonliability

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[8] 50 U. S. C. A. App. Sec. 311 • • • "who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster."

[9] 50 U. S. C. A. App. Sec. 311 • • • "any person who shall knowingly make or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto."

for service, but merely states that he intended to obtain an improper classification thereby. The indictment contains no averment as to his liability or nonliabilty. The terms classification and liability are separate and distinct and are so recognized in the Statute for each constitutes a separate offense. Nonliability for service refers to an exemption or exclusion from military service such as that accorded to certain public officials, fully ordained ministers, aliens and the like. *Bronemann* v. *United States,* C. C. A. 8, 138 F. (2d) 333, 336. Classification refers to the order in which men were placed subject to being called to the service.

Judge Schwellenbach speaking for the District Court in Washington, in the case of *U. S.* v. *Raymond,* 37 F. Supp. 957, wherein the defendant was indicted and charged with representing himself to be a citizen of the United States to members of his election Board, for the purpose of being permitted to vote although he knew he was not a citizen, held that the indictment was defective, because it did not charge that the accused knew he was not entitled to vote unless he was a citizen and represented himself to be a citizen to deceive the election Board. He held too, it is universally recognized that for a representation to be fraudulent it must be made concerning a material fact with knowledge of its falsity and with intent to deceive.

> "The criminal intent of the accused must be alleged where the criminality of the act depends on the intent with which it was done." 27 Amer. Jur. pp. 631, 632. "Intent is always vital when fraud is in issue, U. S. v. Shurtleff, 43 F. 2d 944, C. C. A. 2d."

Since the indictment thus fails to allege an offense against the United States, the conviction herein should be reversed. *United States* v. *Max,* C. C. A. 3, decided May 22nd, 1946.

Point II

There is no designation of inactive reserve or 4 years R. O. T. C. in the executive order setting up classifications. The error of classification was that of the Draft Board in improperly applying the regulations enumerating the categories under I-C.

The Selective Service Regulations by which Draft Boards were to be guided were set up by Executive Order #8560. Section XXI of said Order set up "Class One: Available for Service." • • • Section 344 provides:

> "Class I-C: Member of land or naval forces of United States.—a. In Class I-C shall be placed every registrant who is, or who by induction or enlistment becomes, a commissioned officer, warrant officer, field clerk, pay clerk, or enlisted man of the Regular Army, the Navy, the Marine Corps, the Federally recognized active National Guard, the Officers' Reserve Corps, the Regular Army Reserve, the Enlisted Reserve Corps, the Naval Reserve, or the Marine Corps Reserve; or a cadet of the United States Military Academy; or a midshipman of the United States Naval Academy; or a man who has been accepted for admittance (commencing with the academic year next succeeding such acceptance) to the United States Military Academy as a cadet or to the United States Naval Academy as a midshipman, but only during the continuance of such acceptance.[10]

Under Section 305 (a) certain persons were not required to be registered and were relieved from liability for training and service. Section 305 (b) exempted from training and service in peacetime persons therein described, and

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[10] Executive Order 8560, October 4, 1940. • • • Volume 3, Classification and Selection • • • Section 21, paragraph 344; Selective Service Regulations (2d ed.) 622.15; C. C. H. Manpower Law Service 13.022.

Section 305 (c) likewise deferred persons in other categories. Nowhere in Section 305 is one exempted or relieved from military service by virtue of his holding a commission in the "Inactive Reserves of the U. S. Army."

The effect of stating that one held such a commission is not a statement as to liability or nonliability for service under the Act, nor is the statement that one holds such a commission cause for deferment. Such a person is neither exempted nor deferred by any provision of law from training and service. A false statement relating to liability or nonliability for service under clause 3 is one which, if true, would exempt the maker from service. Thus one who falsely states that he is one of the public officials who by law are exempt from service, or that he is a minister or alien, who likewise are exempt by law, when in fact he is not, offends the Statute because he states in effect that he is not liable for military service. But one who makes a statement which is not true but which, were it true, nevertheless would not exempt him from military service, has not made a false statement within the intendment of the statute. Thus, if instead of making the statement which he did, petitioner had said that he was a cadet at Virginia Military Institute (cadets at the United States Military Academy are exempt by law), or had said that he had served for two years in the Regular Army (those with three years service are exempt), or that he was a justice of the peace (only judges of courts of record are exempt), his statement would not be false within the terms of the Act, for despite such statement the maker would still be liable for service and would not gain exemption thereby. The statement made by petitioner that he held a commission in the In-Active Reserves of the United States Army is in the same category as the examples just cited, for even were it not inaccurate it would not constitute a statement affecting his liability for service. Such a person is not exempt by law.

Point III

There was no reliance by the Draft Board on the letter of May 14, 1941.

The criteria of fraud evoked in civil cases are applicable in criminal prosecutions. *Foshay* v. *U. S.*, C. C. A. 8, 68 F. (2d) 205 at 211.

> "Discussion of what amounts to fraud is found in greater volume in the reports of civil cases, but the principles are no different * * *."

Mr. Justice Lamar in speaking for this court on the question of fraud in *Southern Development Co.* v. *Silva*, 125 U. S. 247 at 250, 85 S. Ct. 881 at 882, 31 L. ed. 678 at 680 said:

> "In order to establish a charge of this character the complainant must show, by clear and decisive proof:
>
> "First. That the defendant has made a representation in regard to a material fact;
>
> "Secondly. That such representation is false;
>
> "Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;
>
> "Fourthly. That it was made with intent that it should be acted on;
>
> "Fifthly. That it was acted on by complainant to his damage; and,
>
> "Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

In *Knauer* v. *U. S.*, 66 S. Ct. 1304, 90 L. ed. 1195, this court held, "Fraud connotes, perjury, falsifications, concealment and misrepresentation."

The fifth element set forth in the *Silva* case *supra* in a criminal prosecution implies reliance. Clearly there was none in the case at hand. The letter of the Draft Board of May 16, 1941 "This Board would like to have something to substantiate your statement" (G-1AA 111 offered 24) is proof of this fact.

The evidence requested was produced on May 21, 1941 in the form of a commission as Second Lieutenant date 1934 which by its terms was good for five years. The person in charge of the Draft Board office examined and returned the certificate to the petitioner. The information she obtained was made available to the Draft Board; "Right after we got it, it would have been presented" (45). There was no way for the petitioner to know what the clerk submitted to the Board. He had a right to rely on the agents of the Board.

Considering the letter of February 10, 1942, if there is any vice therein, no evidence has been adduced to show that the Board relied on it in continuing the classification.

The only evidence is a classification on May 17, I-C and a reclassification on July 11, 1944 I-A and a subsequent reclassification Nov. 1, 1944 II-A.

The Circuit Court of Appeals in its opinion observed that the petitioner wrote that he held a commission of Second Lieutenant in the "In-Active Reserves" using In, a hyphen, and then Active, with the thought, it appears to us, that there was an attempt to use the In as a preposition, suggesting the fact that the petitioner was in the active reserves. In fact the petitioner in his letter wrote "in the inactive reserve" (Ex G-1A offered 24) (130), clearly indicating the single word inactive. As stated in the petitioner's testimony "he used the word inactive so that they would specifically know he did not mean active service" (64).

Point IV

There is no evidence of any intent to commit a crime since the petitioner would have been deferred for other reasons during all of this period.

The Court erred in refusing to direct a verdict at the end of the case because the defendant's acts were not motivated by a criminal intent.

An offense is not committed under Section 311 unless the acts or statements made or issued are accompanied by a criminal intent. *United States* v. *Hoffman*, 2 Cir., 137 Fed. (2d) 416, 419. Assuming that the statement contained in the letter of May, 1941 was untrue, this question nevertheless remains: Did the defendant write the letters of May 1941 and February 1942 to evade service by obtaining an improper exemption or classification [11], or did he make an honest mistake? If the evidence relating to this is as consistent with the defendant's innocence as with guilt and failed to prove wilful intent, the motion for a directed verdict should have been granted. *Candler* v. *United States*, 5 Cir., 146 Fed. (2d) 424, 426.

It is important to note that because of his marital status, physical condition, and occupation, the defendant would have been entitled to deferment and would not have been called for training and service. It is inconceivable that one so situated would seek an improper classification or speak falsely of his liability for service when in fact without such a statement he would have been deferred from service.

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[11] Our argument applies whether the indictment is construed as alleging an offense under clause 2 or clause 3 of Section 311, as we have numbered it, *supra*.

The Selective Service Act was primarily conceived as a training program [12]. Congress fixed a maximum number to be trained at 900,000. This was reduced to 800,000 by limitations of appropriations [13]. Those who had completed training were placed in Reserves [14]. Because of limitations of law and facilities, it was undesirable to train men qualified in military science.

Of the 17 million who registered by December 1941, over 12 million had been deferred with more than 10 million being placed in Class III-A in order to preserve the family life [15].

> "It was felt to be socially desirable that the family as the foundation social institution should be maintained . . . while the financial problem was the main one, the spiritual relationship and dependence was not to be entirely disregarded . . ." [16].

In the actual process of classification the following procedure was followed:

> "We ask ourselves 'Is this registrant deferred by law by virtue of the position he holds?' 'Has he dependents?' 'Does his occupation warrant us leaving him here rather than sending him into the Army?' If these questions are answered in the affirmative, the registrant is placed in one of the deferred classes." [17]

Only those men who were acceptable because they were mentally, physically and morally fit and had no claim for

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[12] Fitzpatrick, Universal Military Training, McGraw-Hill Book Company, 1945, page 319; Selective Service in Peacetime, First Report of the Director of Selective Service to the President, 1940-1941, page 46.

[13] Selective Service in Peacetime, page 122.

[14] Selective Service in Peacetime, id. pages 26-35.

[15] Selective Service in Peacetime, id. page 137.

[16] Selective Service in Peacetime, id. page 137.

[17] Selective Service in Peacetime, id. page 126.

deferment were inducted [18]. The minimum visual requirements were 20/40 or better [19].

The purpose of the act and the policies followed were given wide publicity. Petitioner heard that the purpose was to train as many untrained men as possible, implying to him that a trained man was not to be retrained (59). He had been married since 1931 (57) so because of his wife's dependency he would be deferred, even had he not been previously trained. He would have been deferred as a necessary man in an essential business as were his employees (77). He knew his eyes were 20/80, which was below Army standards [20].

It is inconceivable that petitioner wrote the letters of May 1941 and February 1942 to evade service. In the May 1941 letter he said "Inactive Reserve" so that the Board would know he was not a member of an Active Reserve Corps (68). This way of expressing himself is a misconception and not a false statement as to his eligibility for service. He did not state that it was his belief that he was not obliged to serve his country. In the light of what he had read and heard he expressed the belief not that he should not serve, but that he was not obliged to fill out the questionnaire. He volunteered to furnish any information which the Board might desire in connection with his statement. No one deliberately making a false statement with an improper motive would volunteer to expose himself to inquiry.

Nor is it reasonable to suppose that one committing or intending to commit an offense would not seek to perpetuate his criminal act, given the opportunity to do so. When the petitioner completed his questionnaire he merely

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[18] Selective Service in Peacetime, id. page 110.

[19] Selective Service in Peacetime, id. page 213.

[20] Selective Service in Peacetime, id. page 213.

stated that he had had four years of R. O. T. C. at Rutgers University. He completely left blank series XIII which asked for information concerning "Present Members of Armed Forces," and did not state that he held a commission in the In-Active Reserves for no such designation appears in that series. Had he intended to convey the impression that he held an existing commission in the Officers Reserve Corps he would in all likelihood have completed Series XIII. The fact that he did not is persuasive evidence that he did not intend to mislead the Draft Board.

That he was entitled to deferment at all times is clear. When, in 1944, the War Department, in reply to an inquiry from the Draft Board, informed the Board that his commission had expired in 1939, he received an occupational deferment after he had been placed in Class I-A (35).

It is evident that the petitioner was not motivated by a desire to evade service, since he would not have been called to serve because of his various reasons for lawful deferment. In the absence of such motive it cannot be said that he possessed or acted with criminal intent. In the absence of such an intent the motive for a directed verdict should have been granted.

Point V

The letter of February 10, 1942 refers, and is in answer to the letter of the Draft Board, dated February 6, 1942, wherein it asks "Present Status Since Declaration of War" (December 7, 1941).

Finding that the petitioner could not be prosecuted for his act of May 14, 1941 (we do not concede that this act constituted an offense) attention was focused on the letter of February 10, 1942, and an attempt was made to bring this within Section 311. As we read the indictment the

offense charged against the petitioner falls within clause 2 of that section. The indictment contains no averment that an improper classification of petitioner was made, and consequently does not charge the offense described in the second clause. This contention of the petitioner was sustained by the Circuit Court of Appeals (129).

There is further no averment in the indictment that the petitioner knowingly made any false statement as to his liability or nonliability to serve, as required under clause 3 of this section. There is no allegation that the February 10, 1942 letter referred to the petitioner's liability or nonliability for service. The indictment merely states that he delivered a letter to his Draft Board with the intent that the Board might be induced to allow the petitioner a classification to which he was not entitled. The terms liability or nonliability and classification are separate and distinct, and the statute so recognizes them. Liability or nonliability for service refers to those who are subject or excluded from service and training, whereas classification refers to the order into which registrants would be placed.

The letter of February 10 is actually a true statement. It cannot form a basis of a charge. The February 6th letter asked the petitioner to advise the Board of his status "since the declaration of war." Actually since that time his status had not changed. He was still living with his wife, his occupation was unchanged and his physical condition was the same. This same interpretation of status was used by the Draft Board as shown by the testimony of one of its members, Mr. Segoine. "Q. Now, in May 1941 down to March 1942, how did your Board classify married men? A. That all depended on their status, children, jobs, a dozen things" (36). His statement "my status has not been changed" was true and no offense was committed.

The Court below recognized this in this charge:

> "If you find from the evidence that the defendant on February 10th, 1942 did not represent to his Draft Board that he was one of the persons who was exempt by law from training and service under the Selective Service Act, then your verdict must be not guilty" (105).

POINT VI

Action on the letter of May 14, 1941, was barred by the Statute of Limitations since the indictment was not returned until February 6, 1945 (1).

The indictment was returned on February 6, 1945 (1). The prosecution of the petitioner under the indictment was barred by the Statute of Limitations,[21] since the Act constituting the offense occurred more than 3 years next before the return of the indictment.

Unless the exception is written into the terms of the statute that nondiscovery, nondisclosure or concealment, shall toll or interrupt its running, the statute begins to run at the time of the offense, and continues to run without interruption to the point of final bar, irrespective of nondisclosure or affirmative acts of concealment on the part of the accused; and no court can write into such a statute exceptions which do not therein appear.

This contention was sustained by the Supreme Court in *Pendergast* v. *United States*, 317 U. S. 412, 87 L. Ed. 368, an action for contempt of court, in an opinion by Mr. Justice Douglas, wherein it held:

> ". . . we are of the opinion that this prosecution was barred by Section 1044 of the Revised Statutes.

[21] 18 U. S. C. A. Supp. 582: "No person shall be prosecuted, tried, or punished for any offense, not capital * * * unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed."

"It would seem that the Statute fits this case like a glove . . ."

"If there is a contempt, it takes place when the 'misbehavior' occurs in the 'presence' of the court. Statutes of Limitation normally begin to run when the crime is completed. See United States vs. Irvine, 98 U. S. 450, 25 L. Ed. 193 . . .

". . . the mere continuance of a fraudulent intent after an act of 'misbehavior' in the 'presence' of the court, does not make that 'misbehavior' a continuing offense under Sec. 268. The misrepresentations to the court made possible, of course, the consummation of the nefarious scheme. But each subsequent step in the scheme did not constitute a contempt unless, like the misrepresentation itself, it was 'misbehavior' in the 'presence' of the court or 'so near thereto as to obstruct the administration of justice'. The fact that the scheme was fraudulent and corruptly obstructed the administration of justice does not enlarge the limited power to punish for contempt . . . We are forced to conclude that any contempt committed occurred not later than February 1, 1936, when the court ordered the distribution of the impounded funds. It was therefore barred by the Statute of Limitations."

Conclusion

It is respectfully submitted that, for the reasons hereinabove stated, petitioner's petition for a Writ of Certiorari should be allowed. It appears that the specific question presented has not heretofore been passed upon by this Honorable Court. The decision of the Circuit Court of Appeals for the Third Circuit, adverse to petitioner's contention relative to the construction of that portion of the statute discussed, is the only ruling upon this specific question handed down by any Circuit Court of Appeals. The decision is contrary to the fundamental precepts of our Judicial system, to permit a jury to determine as a question of

fact that the words "inactive reserve" mean Officers Reserve Corps, and to permit the Court to determine that the Statute of Limitations was tolled on an act which in itself was completed offense by the performance of a subsequent act without reference to the former.

Respectfully submitted,

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